

ADA/FMLA Compliance: Traps for the Unwary

Employment Law Conference

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WHAT DO THE FMLA / ADAAA REQUIRE

- The FMLA requires a covered employer to grant certain employees up to 12 work weeks of unpaid, job protected leave a year, and requires group health benefits to be maintained during the leave as if employees continued to work.
- The ADAAA requires a covered employer, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who is disabled. The statute also prohibits “regarded as” discrimination.

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APPLICATION DURING THE EMPLOYMENT PROCESS

	FMLA	ADA AA
Pre-Offer	Not applicable	Applicable
Conditional Offer	Not Applicable	Applicable
During Employment	Applicable (after 12 months and 1,250 hours)	Applicable

As can be seen from the table above, the ADA AA has a much broader scope than the FMLA, and is applicable to all phases of the employment process.

FAMILY AND MEDICAL LEAVE ACT (FMLA)

What's New and Current Trends

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DOMA DECISION; EFFECTS ON FMLA

- US Supreme Court Decision struck down Section 3 of DOMA which had prohibited federal agencies from recognizing legal same-sex marriages;
- DOL is taking the position that legally married same-sex couples are eligible for FMLA leave benefits;
 - Under the revised regulations, married gay and lesbian couples' eligibility for FMLA benefits will depend on their state of residence. The regulation will apply to all private and public employers and workers, including state and federal agencies.

FMLA EMPLOYER PITFALLS

- Notice
- Paperwork
- Intermittent leave

HYPOTHETICAL #1: NOTICE

One day, an employee sees a dog in the company parking lot. The employee starts screaming and cursing, and abruptly leaves the office. For the next few days, she calls out sick. Once her sick days run out, she starts taking days off without approval. The company terminates her employment. The employee claims that she should have been offered FMLA leave, because while she was out on leave, she saw a doctor, was diagnosed with severe anxiety and given medication. The employee never provided the employer with this information.

Was the employer given sufficient notice of the employee's need for FMLA leave?

- A) Sufficient Notice**
- B) Insufficient Notice**



HYPOTHETICAL #2: NOTICE

You are sued by an employee, who claims that he was denied time off that he needed to get treatment for a serious case of anxiety. The employee never asked for leave, and no one at the company was aware that he needed it. At one point, the employee went to the HR manager and told her he was “feeling stressed out” and “didn’t know what to do.” The employee claims that this was enough to trigger an offer of leave.

Was Sufficient Notice Provided?

- A) Sufficient Notice**
- B) Insufficient Notice**



HYPOTHETICAL #3: INTERMITTENT LEAVE

An employee informs you that she suffers from a chronic condition that makes it difficult to make it to work on time. The employee then racks up a number of late arrivals and refuses to work on another shift. The employee had never been tardy or out of work for medical treatment or due to a flare-up of her chronic condition. The only time it affected her was when it was time to go to work. You decide to terminate her employment. The employee argues that her tardiness should have been considered intermittent FMLA leave, because it was caused by her medical condition.

Was the employee eligible for intermittent FMLA leave:

- A) Yes**
- B) No**
- C) Yes, but she did not provide sufficient notice.**



INTERMITTENT FMLA LEAVE

Curbing Employee abuse of FMLA leave:

- Question the original Certification
- Second opinion
- Ensure all absences related to condition are counted
- Apply Paid Leave Policy
- Recertification
- Don't let suspicious circumstances slide
- Control the way employees schedule planned treatment
- Consider temporary transfers

HYPOTHETICAL #4: INTERMITTENT LEAVE

An employee comes to you with a request for intermittent leave and a note from his doctor excusing him from work every time he experiences an acute panic attack. Unfortunately, he reports these panic attacks whenever he has a major presentation or important client meeting, and usually on the day of the presentation. Client meetings are cancelled at the last minute and important work is delegated to other co-workers at the expense of their own work.

You know your employee has a serious health condition and qualifies for intermittent leave under the FMLA, but the timing of the requests is causing significant disruption to your business. You also know that your employee will never exhaust his 12 full weeks of FMLA leave under his intermittent leave.

HYPOTHETICAL #4: INTERMITTENT LEAVE

Are there limits to how and when he can take such Intermittent leave?

A) I can terminate the employee because the intermittent leave causes a major disruption in the course of business;

B) I can transfer the employee to another position that is more well-suited for his intermittent leave;

C) I can require reasonable production requirements so that the employee's last minute leave does not require other coworkers to do his job for him;

D) There is nothing I can do.

THE FMLA AND EEOC?

- **TREND** – A large percentage of FMLA cases are automatically becoming ADA cases when the employee has exhausted all possible leave and is still unable to return to work.
- **EEOC** has served notice ... it is aggressively looking for companies that have automatic termination policies after an employee has missed specific periods of work, contending that such blanket policies violate the ADAAA.

AMERICANS WITH DISABILITIES ACT & ADA AMENDMENTS ACT

(ADA or ADAAA)

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ADA AMENDMENT ACT AND EEOC REGULATIONS

- No per se list of disabilities
- Non-exhaustive list of impairments that will “in virtually all cases” be found to substantially limit a major life activity
- Individualized assessment should be “particularly simple and straight forward”



ADA AMENDMENT ACT AND EEOC REGULATIONS CONT...

- Focused on expanding coverage to individuals with disabilities (designed to expressly reject the Supreme Court's view in the *Sutton* trilogy that disability should be determined by reference to the ameliorative effects of mitigating measures)
- Major life activities now include the operation of bodily functions
- Episodic impairments or impairments in remission will qualify if the impairment would substantially limit a major life activity when active
- Mitigating measures may not be considered to disqualify an individual
- Shifts focus to whether the employer must provide reasonable accommodation to employees that may be disabled under the ADAAA

LEAVE POLICIES UNDER ADA

EEOC contends that employers must “modify attendance and leave policies to provide disabled employees with additional leave” unless another accommodation would allow employee to perform the essential functions of the job or granting additional leave would cause an undue hardship.



HYPOTHETICAL #5: ADA LEAVE

Employee, who worked in a cafeteria in a charter school, injured her shoulder when a very heavy industrial refrigerator door fell off its hinges and landed on her shoulder. She went out on workers' comp. Company sent her the FMLA paperwork while she was out on comp, but the employee never filled out the paperwork. The school year ended and she had surgery over the summer. She was still out on comp through December of the following school year. The doctor, in January, released her to return to work with lifting restrictions, plus she needed to take breaks in her day to do physical therapy exercises, as well as go to physical therapy appointments. Her start date was January 15. The employee came back for one day, but did no substantive work. She then called out sick the next day, and had her private doctor submit a letter stating her shoulder was still bad, that she could not do her job and, thus, could not return to work.

Is the employer required to give her extra leave under the ADA?

A) Yes

B) No

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MODIFIED WORK SCHEDULES

- A modified or part-time schedule may be needed as a reasonable accommodation
- A modified schedule may involve adjusting arrival or departure times, providing periodic breaks or altering when certain functions are performed
- Permitting an employee to perform his or her job duties at home in some instances may be a reasonable accommodation

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HYPOTHETICAL #6: MODIFIED WORK SCHEDULE

A System Support Specialist from your IT department informs you that he is narcoleptic. One way of preventing a flare-up of the medical condition is by allowing the individual to rest every few hours. As an accommodation, the employee requests that the company provide him a dark room and a cot in which he can rest every three hours. The IT Support Specialist's main job responsibility is to assist company employees with IT-related issues.

Does the employer have to accommodate the request for a modified schedule and provide a room and a cot for this employee?

- A) The request is unreasonable and therefore no accommodation is required**
- B) The employer must grant the modified schedule, but does not have to provide a room and a cot**
- C) The employer must both grant the modified schedule and also provide the employee with a room and a cot**

HYPOTHETICAL #6: MODIFIED WORK SCHEDULE CONT...

You decide to grant the employee's request for a modified work schedule. You also set up a room and provide a cot for the employee to use during his rest periods. After utilizing this set up for a period of time, the employee informs you that the accommodation is not effective, and requests to work from home.

Does the employer have to accommodate this additional request?

- A) Yes**
- B) No**

FMLA / ADA – TIPTOEING THROUGH THE MINEFIELD

- Light Duty – ADA does not require the creation of light duty assignments (employee can refuse and take FMLA instead)
- Avoid Stacking – If employee is out on workers' comp temporary total disability, designate time away as FMLA so employee cannot refuse light duty and then take FMLA
- Medical Examination – Any exam you request must be limited to case of injury under comp and cause of leave under FMLA. HR or employer-designated practitioner only for contact with healthcare providers under FMLA

FMLA / ADA – TIPTOEING THROUGH THE MINEFIELD CONT...

- Health Insurance – Under FMLA entitled to it, but employees on a temporary ADA leave are not (unless employer has a policy or practice of continuing health insurance for its employees)
- Confidentiality – Separate collection and retention of documents and confidentiality for both (exceptions are supervisor need to know restrictions for first aid, safety and for government audits) – HIPAA/HITECH
- Reinstatement – FMLA requires reinstatement to same or an equivalent job but under ADA, if cause of leave was a disability, reinstatement to another job, even a lesser one, may be a reasonable accommodation

HYPOTHETICAL #7: TERMINATION AT END OF LEAVE

John is an employee at your facility. He is diagnosed with cancer and takes 12 weeks of FMLA leave. Under your company's policy, John is also eligible and qualifies for 6 months of short-term disability leave. At the conclusion of this short-term disability leave, John does not return to work. As a result, your company HR director sends John a letter notifying him that his employment is being terminated pursuant to company policy.

Have you violated the ADA?

- A) No. Because your policy applies neutrally to all employees taking medical leave.**
- B) Yes. Because your policy fails to leave room for the possibility that extended leave or other forms of accommodation may be required as a reasonable accommodation under the ADA.**
- C) No. Because John has not told you that he suffering from a disability.**
- D) No. Because you provided John with additional leave beyond his 12 weeks of FMLA leave.**

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Thank You



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Note: This document is not intended to give legal advice. It is comprised of general information. Employees facing specific issues should seek the assistance of an attorney.